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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, Deceased,
Appellant,

v.

KERR-MCGEE CORPORATION, a Delaware corporation, and KERR-MCGEE NUCLEAR CORPORATION, a Delaware corporation,
Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

JURISDICTION

Appellees (hereinafter "KM") and the Solicitor General dispute this Court's jurisdiction under 28 U.S.C. § 1254(2), because the court below did not expressly mention Oklahoma's punitive damage statute in its opinion. KM Br. 12; US Br. 2.[1] This argument is specious. Punitive damages exist in Oklahoma *only* pursuant to the state statute, and that statute unquestionably authorized punitive damages here.[2] The district court recognized that the statute was controlling (App. 85a), and indeed instructed the jury in the words of the statute (App. 112a). When the court below decided to override the

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[1] As used herein, "Aplt Br." refers to the Brief for Appellant, "KM Br." refers to the Brief for Appellees, "US Br." refers to the Brief For The United States Supporting Appellees, and "AIF Br." refers to the Brief of The Atomic Industrial Forum, Inc., as Amicus Curiae. Lest there be confusion, it should be noted that the "Brief for the United States" cited in appellant's *opening* brief is the brief filed by the Solicitor General in response to the Jurisdictional Statement, while the "US Br." cited herein is the later brief filed by the Solicitor General following this Court's postponement of the determination of jurisdiction.

[2] Thus, e.g., in *Thiry* v. *Armstrong World Industries*, 661 P. 2d 515 (Ok. 1983), the court rejected a contention that punitive damages should be unavailable in product liability actions because the purposes of punitive damages are inapposite in such actions, declaring:

> A jury is authorized to "give damages for the sake of example, and by way of punishing the defendant" . . . "in *any action* for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed." [Citing 23 O.S. § 9]. Products liability clearly falls within the statutory scope of "any action" and is not within the contract limitation. [*Id.* at 517, emphasis in original].

Conversely, in *Burton* v. *Juzwik*, 524 P.2d 16 (Ok. 1974), the Oklahoma Supreme Court held that punitive damages *cannot* be awarded in a breach of contract case, because of the statutory exclusion of actions "arising from contract", declaring: "In resolving the issue relating to punitive damages, we must determine whether plaintiff's action comes within the purview of 23 O.S. 1971, § 9".

"strong presumption against preemption of *state laws* affecting such vital interests of its citizens as those involved in the instant case" (App. 24a, emphasis added), the only "state law" in Oklahoma to which it could have been referring was 23 O.S. § 9. Neither KM nor the Solicitor General suggests otherwise.[3] By holding that punitive damages are preempted in all radiation injury lawsuits against "plants handling nuclear material" (App. 24a), the decision below "amounts to a holding that [23 O.S. § 9], as applied to this class of cases, is invalid" and thus the decision is appealable. *United States* v. *Knox*, 396 U.S. 77, 79 n.2 (1969); see also *United States* v. *Brewster*, 408 U.S. 501, 504-507 (1972).[4]

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[3] Indeed, the briefs of both KM and appellant to the court below recognized that the availability of punitive damages was controlled by 23 O.S. § 9 (Aplt Br. 2-3 n.2).

The Solicitor General, noting that the Oklahoma Supreme Court has held punitive damages unavailable in suits against municipalities, speculates that that court might interpret § 9 as inapplicable to nuclear operators (US Br. 7 n.14, 8). That speculation is wide of the mark. The Oklahoma Supreme Court has made clear that it views § 9 as applicable *to all* tort actions against private defendants, and as foreclosing judicial discretion to withhold them even where they might appear to be inapposite. See *Thiry*, quoted *supra*, n.2. The Solicitor General cites nothing in Oklahoma law that could lead to a different result here. To be sure, the Oklahoma Supreme Court has held that punitive damages are unavailable in suits against municipalities (U.S. Br. 7 n.14), but that holding simply reflects "the general rule" recounted in *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 260 n.21 (1981), that "no punitive damages are allowed [against municipalities] unless expressly authorized by statute" (and see gen. *id.* at 259-263).

[4] The Solicitor General attempts an analogy to cases arising under 28 U.S.C. § 1257 (US Br. 2-4 & n.3), but overlooks that those cases turn on a procedural prerequisite that appears in § 1257 but not § 1254. In § 1257 cases, the party seeking review in this court is the one challenging the validity of the state statute, and a precondition to appeal is that the validity of the state statute have been "drawn in question" by the appellant in the state courts (§ 1257(2)) and a precondition even to certiorari is that a federal "title, right, privilege or immunity" was "specially set up or claimed" in the state courts (§ 1257(3)). These requirements are imposed to assure that a state court decision is not challenged in this Court on a ground

FACTS

KM complains that our statement of facts is "one-sided" (KM Br. 2). We noted in our opening brief that, "[a]s the jury returned a verdict for plaintiff, the evidence must be viewed in the light most favorable to plaintiff" and "[o]ur recitation of facts proceeds accordingly" (Aplt. Br. 8). KM's counterstatement at best reflects what the jury might have found (but did *not* find) the facts to be had it resolved the conflicts KM's way. We say "at best," because KM's version of the facts rests on carefully selected items of evidence taken out of context, and the overwhelming weight of the evidence pointed in plaintiff's favor. We cite a few instances in the margin.[5]

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that was not advanced to the state court, in part out of considerations "of comity . . . [which] require that the state courts be afforded the opportunity to perform their duty." *Webb* v. *Webb*, 451 U.S. 493, 499 (1981). See also *Wilson* v. *Cook*, 327 U.S. 474, 480 (1946); C. Wright, A. Miller & E. Cooper, 16 *Federal Practice and Procedure: Jurisdiction*, § 4013, p. 627 (1978); *id.*, § 4022, pp. 696-698; *id.* (Vol. 17), § 4036, p. 26; J. Moore, H. Bendix & B. Ringle, 12 *Moore's Federal Practice: Supreme Court Jurisdiction and Practice*, § 510.01, p. 8-56 (1982).

The Solicitor General would impose upon the lower federal *courts*, in § 1254(2) cases, the same burden of precise articulation as § 1257 imposes upon litigants. The simple answer is that the language of § 1257 that imposes that burden is not to be found in § 1254(2). Nor would it make sense to condition appellate access to this Court upon the particular choice of words used by the lower court to express its holding. If, as here, the lower court has "held invalid" a state statute as applied, the requirements of § 1254(2) have been fully met.

[6] 1. KM implies that Silkwood herself "spiked" her urine samples (KM Br. 3). That was a critical issue at trial: KM's contention was that Silkwood had carried plutonium from the plant to her apartment and there "spiked" her urine samples. The jury was instructed that if Silkwood intentionally brought the plutonium to her apartment it must find for KM (App. 100a). The jury expresaly found, in response to a special interrogatory, that Silkwood had not done so (I J.A. 202). That finding, which was sustained by the court of appeals (App. 8a, 20a-21a), is plainly supported by the overwhelming weight of the evidence, which demonstrates the virtual inconceivability that Silkwood, who was very health-conscious, would have, or even could have, spiked her urine sample with a form of

ARGUMENT

A. The Preemption Issue

1. In our opening brief, we showed that neither the Atomic Energy Act of 1954 nor any of the subsequently enacted atomic energy legislation was intended to pre-

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plutonium that she knew was not excretable from the body, and that came from a "lot" of plutonium at KM's plant to which Silkwood did not have access. (See App. 134a-136a, Pars. 17-22, and record sources cited thereat).

2. KM's defense of its effort to administer DPTA to Silkwood (KM Br. 3 n.4) is a *non-sequitur*. Whatever value DPTA may have in the treatment of contamination by *soluble* plutonium (i.e., plutonium the body can excrete), Silkwood was known to have been contaminated with *insoluble* plutonium (which cannot be excreted from the body). The experts on both sides testified—and the point is uncontradicted in the record—that DPTA is not effective against insoluble plutonium. (III J.A. 958, IV J.A. 1627).

3. KM's characterization of Silkwood's contamination as posing a "negligible probability of injury" (KM Br. 4, n.6)—in the face of a jury finding to the contrary—ignores (1) that two expert witnesses testified that Silkwood had suffered serious physical injury by reason of her contamination (see II J.A. 912-929, 934-935, 977-979, 990-993); (2) that there was a wide margin of error in the measurements at the autopsy, and thus Silkwood in a three day period may have been contaminated by amounts substantially exceeding AEC numerical *lifetime* exposure limits even for industrial workers (Aplt Br. 12 and n.21); (3) that even if Silkwood's contamination was at the lower end of the range, that was 2½ times the AEC *lifetime* exposure limits for members of the public (*id.* 12); and (4) that, as is generally understood and as the AEC Regional Director testified, AEC numerical exposure limits are not "safe" limits, which is why the AEC independently exhorted operators to keep exposure levels "as low as practicable" (*id.* 9 and n.14; see also surces cited at App. 64a-66a).

4. KM attempts (KM Br. 6 n.9) to discredit the testimony of Dr. Karl Morgan—who was for 29 years the Director of Health Physics at Oak Ridge National Laboratory (Aplt Br. 12)—on the ground that Dr. Morgan had neither seen the plant nor consulted its personnel. As the trial occurred four years after the plant had closed, such observation was not possible. But Dr. Morgan had reviewed voluminous contemporaneous documentary materials reflect-

empt state law tort actions arising out of nuclear incidents. To the contrary, as we showed, such actions continued to be viable after the passage of the 1954 Act, and Congress has chosen not to limit the relief available in such cases except in specific and precisely stated ways not applicable here. Congress has never expressed any intention that plaintiffs in such state law tort actions be deprived of whatever right the state tort law may grant to seek puntive damages—a traditional tort law remedy available in all but a handful of states.

KM and the *amici* supporting its position do not contend that Congress has manifested any particular inten-

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ing the conduct of the KM plant before formulating his opinions. These are identified at P. Ex. 1-D and Tr. 1550-52.

5. KM (KM Br. 6) and the Solicitor General (US Br. 16 n.22), while not disputing our statement that KM could not locate over 40 pounds of plutonium, declare that the statement is "misleading" (US Br. 16 n.22) because subsequent studies determined that much of the missing plutonium was "held up" in the plant. Both briefs rely upon the direct testimony of a former KM official that 10.9 kilograms of the plutonium were "held up" in the plant, and thus that only 4.4 kilograms (10 pounds) had escaped from the plant—an amount only slightly in excess of the maximum permissible escape tolerated in NRC regulations. But on cross-examination the witness acknowledged that the KM study had gone no further than to estimate the amount "held up" as falling somewhere between 7.9 and 13.9 kilograms, thus making it equally likely that the amount that had *escaped* the plant was 7.4 kilograms (Tr. 8034-35)—nearly twice the maximum permissible under NRC regulations. And a subsequent study by the government estimated that the amount "held up" in the plant could be as little as 4.9 kilograms, meaning that the amount that had escaped the plant could be as high as 10.4 kilograms (Tr. 8036-44; P. Ex. 83)—nearly three times the NRC maximum. In any event, all of the estimates of "hold up" were highly speculative, for, as the government study acknowledged, efforts to measure "held up" plutonium within a plant were untested and experimental, and reduced, ultimately, to extrapolations and judgment calls. (P. Ex. 83, pp. 7, 9, 15, 17-19; Tr. 8046-58).

6. We discuss *infra*, pp. 13-14 n.12, the results of government investigations of Silkwood's contamination (KM Br. 5) and of the allegations of unsafe conditions she had made to the AEC prior to her death (*id.* at 5, n.8).

tion to preempt punitive damages in such cases. Indeed, they deny that it is their burden to make such a showing. See, e.g., KM Br. 23. Rather, they argue more broadly that Congress intended to preempt the entire field of regulation of nuclear safety, and that punitive damages in tort suits arising out of nuclear incidents are a form of such regulation and are therefore preempted. For this argument, KM and its *amici* rely heavily on the following passage in this Court's recent decision in *Pacific Gas & Electric Co.* v. *State Energy Resources Commission*, —— U.S. ——, ——, 51 L.W. 4449, 4455 (April 20, 1983):

> [T]he federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states.[25]

[25] In addition to the opportunity to enter into agreements with the NRC under § 274(c), Congress has specifically authorized the states to regulate radioactive air pollutants from nuclear plants, Clean Air Act Amendments of 1977, § 122, 42 U.S.C. § 7422 (Supp. III 1979), and to impose certain siting and land use requirements for nuclear plants, NRC Authorization Act for Fiscal Year 1980, Pub. L. 96-295, 94 Stat. 780 (1980).

The argument of KM and its *amici* proves too much. By their definition, "the entire field of nuclear safety concerns" includes not only the punitive damages remedy in a state-law tort suit arising out of a nuclear incident, but the compensatory damages remedy as well. For, as we showed in our opening brief (at 42-43), and as KM and its *amici* acknowledge (see KM Br. at 23; US Br. at 22-23), the availability of awards of compensatory damages in tort actions has a regulatory impact. But KM and its *amici* do not dispute that the federal atomic energy laws were not intended to preempt awards of compensatory damages. And this Court was well aware of the non-preemption of state tort actions when it wrote the quoted passage in *Pacific Gas & Electric*.[6]

[6] In *Duke Power Co.* v. *Carolina Env. Study Group*, 438 U.S. 59 (1978), this Court recognized that the Price-Anderson Act had

KM and its *amici* recognize that their effort to treat the passage in *Pacific Gas & Electric* as applicable to state tort law fails unless they can reconcile the passage with the conceded non-preemption of state-law tort actions for compensatory damages. Thus, they argue that in the Price-Anderson Act Congress "expressly ceded" to the states the power to award compensatory damages arising out of nuclear incidents (KM Br. 29-30; US Br. 32). This argument does not bear analysis.

As this Court recognized in *Duke Power*, the victims of a nuclear incident enjoyed the "right *prior to the enactment of the Price-Anderson Act* . . . to utilize their existing common-law and state-law remedies to vindicate any particular harm visited on them from whatever sources." 438 U.S. at 88-89 n.33 (emphasis added). Indeed, the Solicitor General's brief concedes that prior to Price-Anderson the 1954 Act did not preempt state law actions for compensatory damages. (US Br. 26).[7] Price-Anderson was passed to deal with the deterrent effect on entry into the nuclear industry that just such tort suits posed for nuclear companies. See Aplt Br. at 24-26; *Duke Power*, 438 U.S. at 64.

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been adopted for the very purpose of providing a means to satisfy the potential state law tort liability of companies in the nuclear industry. And in *Pacific Gas & Electric* itself the Court expressly alluded to Price-Anderson and to the limitations established by that Act on private liability in tort actions arising from nuclear incidents. 51 L.W. at 4457.

[7] That brief errs, however, in stating that prior to the 1954 Act there was "no role whatever for the states" (US Br. 13, citing *Pacific Gas & Electric*). While that is true with respect to the *management* of nuclear facilities (the point made in *Pacific Gas & Electric*) it is *not* true with respect to tort damage litigation. There were numerous private contractors assisting the federal government in the conduct of its "absolute monopoly over atomic energy" (US Br. 13). Those contractors were vulnerable to state-law tort actions, and precisely because they were the government had included provisions in their contracts indemnifying them in the event of tort liability. See *Hearings before the Joint Committee on Atomic Energy on Government Indemnity*, 84th Cong., 2nd Sess. (1956), at 76-85 (hereinafter "*1956 Hearings*").

Thus, the function of Price-Anderson was not to confer an authority upon the states that the states would not otherwise have had. The predicate of Price-Anderson was that the Atomic Energy Act of 1954 had not preempted state-law tort actions against private companies involving nuclear incidents.

Reflective of this history, not a word in Price-Anderson purports to be a grant of authority to the states to entertain suits for compensatory damages. Rather, the language and structure of the Act assume that such authority already existed in the states. And, the footnote to the passage from *Pacific Gas & Electric* relied upon by KM and its *amici* shows that this Court did not regard Price-Anderson as "expressly ced[ing]" any authority to the states. That footnote, which we have quoted *supra* at 6, lists the powers that Congress "expressly ceded" to the states; the footnote contains no reference to the Price-Anderson Act or to the states' power to entertain suits for compensatory damages.

Thus, the quoted passage in *Pacific Gas & Electric* cannot be read as broadly as KM and its *amici* would have it read. As we showed in our opening brief, Congress has marked out a very different role for the states in providing remedies in tort suits involving nuclear incidents than in the licensing and direct regulation of the nuclear industry. In the latter area, Congress has determined that with respect to matters of safety and health the federal government should occupy the entire field except where it expressly cedes regulatory power to the states. The *Pacific Gas & Electric* passage must be understood as referring only to that area. For in the former area—state law tort suits against private nuclear companies—it has long been clear, without any express ceding of power, that Congress did not in the 1954 Atomic Energy Act, nor in any subsequent atomic energy legislation, intend to preempt or occupy the field.

Accordingly, KM and its *amici* cannot rely simply on the assertion that punitive damages are preempted be-

cause the entire field of nuclear safety is preempted. Rather, they must show that Congress, while not preempting traditional state-law tort actions in the field of nuclear safety, nevertheless intended to preempt a traditional part of such actions—punitive damages. Such a showing would require "a clear manifestation of [Congress'] intention to do so." *New York Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 413 (1973); see Aplt Br. at 21-22. KM and its *amici* have not pointed to a single word in the history or language of the various atomic energy acts that expresses a congressional intention to carve punitive damage remedies out of state-law tort actions in the nuclear safety area. Indeed, all the evidence shows that Congress meant to leave the state tort law entirely unaffected except as it expressly provided otherwise (Aplt Br. 24-41).[8]

2. The reliance of KM and its *amici* on the passage from *Pacific Gas & Electric*—more generally their reliance on the notion that state-law punitive damages are preempted as part of a general federal occupation of the field of nuclear safety—fails for another reason: that reliance depends on a mischaracterization of the role of punitive damages under Oklahoma law. Thus, KM's brief asserts that "[t]he purpose of the [punitive damages] award was to punish Kerr-McGee for maintaining allegedly unsafe plant conditions and for 'permitting' the escape of plutonium" (KM Br. 9). And the Solicitor General's brief asserts that punitive damages are awarded to punish "conduct the state deems unsafe" (US Br. 10), "conduct found by a jury to endanger the public safety" (*id.* at 32), "what the states may deem unsafe practices" (*id.* 34). See also AIF Br. 9.

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[8] Given that punitive damages are an integral part of tort law in all but a handful of states (Aplt Br. 41 n.46), and have indeed been an important part of the law of damages for centuries (see Brief for the New Jersey Department of the Public Advocate as Amicus Curiae, pp. 13-26), it is telling that Congress gave not the slightest expression of an intention to take the unprecedented step of excising this remedy from state-law tort actions.

Such characterizations are necessary to the contention that awards of punitive damages are designed to regulate safety practices in the operation of nuclear facilities. But the conduct described in the above-quoted characterizations is conduct that is appropriately the basis for an award of compensatory damages, not an award of punitive damages. As we showed in our opening brief, punitive damages are not a remedy for "unsafe" practices or conditions; compensatory damages are. Punitive damages are not awarded based on the level of radiation that might have been emitted—which is the subject of federal concern. Punitive damages are awarded as a remedy for "outrageous" conduct of a defendant: conduct motivated by a malicious or reckless state of mind. When such conduct occurs, regardless of the level of radiation emissions involved, the states have an interest in punishing it that is distinct from and transcends questions of nuclear safety. See Aplt Br. 43-49.

3. The Solicitor General's brief compounds the error just discussed. That brief suggests that the jury instructions in this case authorized punitive damages if KM was found to have failed to exercise "reasonable care." U.S. Br. 20. The brief then contends that "to allow[] a jury to define 'what constitutes the exercise of reasonable care in handling plutonium' [would] invade[] the field of nuclear safety concerns by setting up substantive standards in competition with those fixed by federal law." *Ibid.* But the jury instructions in this case did not authorize punitive damages on a finding of lack of "reasonable care." "Reasonable care" was relevant only to the question whether Kerr-McGee was guilty of negligence and thus liable for *compensatory* damages; the jury was instructed that the test for *punitive* damages was whether Kerr-McGee was guilty of "oppression, fraud or malice, actual or presumed" (a standard that would be met if Kerr-McGee was "grossly and wantonly reckless in exposing others to dangers"). App. 112a.[10]

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[10] The district court submitted plaintiffs' claim for compensatory damages to the jury on two theories—strict liability (App. 98a-

In fact, the very issues that the Solicitor General's brief argues Congress could not have meant to leave to state court juries—issues of nuclear safety and reasonable care—Congress unquestionably decided *would* be left to such juries in determining liability for compensatory damages under state law. The Solicitor General's brief, proclaiming "the obvious ineptness of state common law for creating substantive rules of safe conduct applicable to nuclear facilities" (US Br. 26), argues as if Congress in Price-Anderson took such questions from state court juries by mandating strict liability as the standard in state-law tort suits involving nuclear incidents:

> If licensees were strictly liable, the only issues in state tort litigation would be causation and the calculation of the damages required to compensate the victim of harm; questions about the duty of care would be irrelevant. That division of authority is desirable from a federal perspective as well. Because there is no federal interest in specifying how compensation (up to a certain limit) is to be distributed, it is efficient to leave that matter to the states. By contrast, the definition of safety standards, and their enforcement in cases where external costs alone provide insufficient incentive for compliance, are matters that call for the expert judgment of the NRC. [US Br. at 26]

100a) and negligence (*i.e.*, lack of "reasonable care") (App. 100a-101a)—and directed the jury to answer a special interrogatory as to whether it found the latter (App. 125a). This precaution assured that, if the jury found negligence (as it did, I J.A. 202), there would be no need for a retrial were the Tenth Circuit to reverse the district court's conclusion that Oklahoma would impose strict liability upon operators of nuclear facilities.

In the passage quoted at US Br. 20, the trial judge was instructing on the weight to be accorded evidence of KM's compliance with AEC regulations in determining (1) whether KM had exercised reasonable care for purposes of the negligence claim, and (2) whether KM was guilty of "reckless and wanton conduct" for purposes of punitive damages (App. 102a). The trial judge was *not* charging that punitive damages could be awarded for breaches of "reasonable care".

But Congress did *not* mandate strict liability in such suits. Congress required a limited category of nuclear operators, which did not include KM, to, by waiver of defenses, accept strict liability as the standard of liability for a narrowly defined category of cases termed "extraordinary nuclear occurrences" (ENO's). Congress decided that in all other tort actions arising out of nuclear incidents the standard of liability would be that set by "traditional rules of [state] tort law." Aplt Br. at 35; see gen. *id.* at 29-36. So far as Congress was concerned, it was perfectly acceptable if states chose negligence—"reasonable care"—as the standard for *all* suits against operators (like KM) not covered by Price-Anderson, and indeed against covered operators as well except in the event of an ENO.[11]

Thus, the arguments in the Solicitor General's brief respecting the role of juries in nuclear safety cases are most appropriately directed to the question whether *compensatory* damages should be preempted in such cases. Certainly, those arguments provide no basis for distinguishing between compensatory and puntive damages in determining the preemptive effect of the federal atomic energy acts. And that is the burden of appellees and their *amici* in this case. We noted in our opening brief that no previous case in any area of federal regulation has attributed to Congress an intention to preempt only the punitive damages aspect of state-law tort actions. Neither KM nor *amici* dispute the accuracy of that statement, nor do they marshall any evidence to demonstrate that in this instance Congress should be found to have intended such an extraordinary result.

4. The Solicitor General's brief argues that punitive damages are preempted because Congress has authorized

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[11] The briefs of KM and the Solicitor General attack the reliability of the jury system and thus implicitly challenge the congressional determination to leave such questions to juries. That decision was and is for Congress to make, and in enacting and extending Price-Anderson Congress indicated complete satisfaction with reliance on the jury system.

the NRC to punish *violations of NRC regulations* and the NRC, in exercising that authority, takes account of willfulness and recklessness in scaling penalties. But as noted in our opening brief (at 49), it is only in the event of violations of its regulations that the NRC can punish at all. And that constraint is not coterminous with the states' interest in punishing malicious and reckless behavior.

As the district court demonstrated at length (App. 64a-69a), no-one—least of all the NRC—suggests that its regulations are a guarantee of safety.[12] Yet the NRC

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[12] A few examples from the record will make the point:

1. KM states (KM Br. 5 n.8) that following Silkwood's death the 39 allegations that she and other local union officials had made to the AEC of unsafe conditions at the plant were investigated, and that only "[t]hree violations [of regulations] . . . were noted." But the report found that *twenty* of the allegations of unsafety were wholly or partially substantiated; of these, seventeen reflected unsafe conditions that did not constitute violations of AEC regulations (II J.A. 792). Among the unsafe conditions that did *not* violate regulations were: continuing regular production in contaminated areas before the contamination was removed (*id.* at 796-797); failing to advise employees of required respiratory protection (*id.* at 797-798); allowing contamination to sit for 14 days without removal (*id.* at 799); misvalving errors resulting in contamination that could have caused a criticality problem (*id.* at 800; KM's failure to notify AEC of the errors was found to be a violation of AEC regulations, but the errors themselves were not (*ibid.*)); contamination leaks (*id.* at 801); waste jugs filled beyond capacity (*id.* at 801); and plant contamination exceeding safe operating limits (*id.* at 802-803).

2. KM notes (KM Br. 5), that the AEC concluded that the damage to Silkwood's property was not caused by violations of AEC regulations. That conclusion, if accurate, shows that, without any violation of regulations, contamination could occur of such magnitude that a crew ranging from two to seven employees *dressed in full protective clothing with full face respirators*, and working under the supervision of AEC and Oklahoma public health officials, had to devote nearly a month to dismantling Silkwood's apartment —tearing up bathroom tiles and removing refrigerator, stove, TV, sofa, tables, carpeting and twelve 55-gallon drums of smaller articles—before federal and state health officials would declare the

cannot punish—and does not purport to punish—even the deliberate infliction of radiation injuries through exposures below the numerical limits stated in the regulations.[13]

A nuclear operator could, without violating any of the NRC's regulations, maliciously or recklessly inflict serious injury through radiation exposure. See Aplt Br. at 48. Indeed, KM asserts that the NRC's exposure limits were not violated in this case. See KM Br. at 4; but see Aplt Br. at 12. The NRC's regulations do not provide for any punishment in such a situation, no matter how malicious or reckless the state of mind with which the conduct was undertaken.

The Solicitor General acknowledges that states may punish corporate executives (albeit apparently not corporations themselves) for intentional irradiation, even where the amount of irradiation does not transgress the NRC exposure limits. US Br. at 33 n.38. Presumably, the Solicitor General distinguishes between the executives

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apartment habitable (Motion to Dismiss or Affirm, A20-A22; See also, P. Exh. 126, D. Ex. 27).

3. As the US Brief acknowledges, p. 17, n.23, the NRC regulation on removal of plutonium from the plant (requiring operators to monitor against removals of half a gram or more) is a "security system—designed to prevent sabotage and theft of weapons materials—[and is] not intended to be a safeguard against removal of smaller amounts of plutonium." One-half gram is enough plutonium to give 35 million people their lifetime lung burden (Aplt Br. 14).

[13] We noted in our opening brief (p. 12) the testimony of AEC's Regional Director that the AEC's "as low as practicable" exhortation lacked "regulatory teeth" and that in consequence KM gave "short shrift" to contamination incidents that did not exceed the specific *numerical* exposure limits. The NRC's enforcement policies —upon which the opposing briefs place such great weight—confirm that penalties are assessed only for violations of the numerical exposure limits (47 F.R. 9994, Supplement IV, Pars. A-1, B-1, C-1, D-1). Therefore, only in the case of contaminations exceeding the numerical limits does the NRC have the opportunity to punish at all, much less to punish intentional or reckless conduct more severely than innocent conduct.

on the one hand, and the corporations on the other, on the theory that if the states can punish the corporations in those circumstances, the corporations would be under pressure to conform to standards more restrictive than those of the NRC. But—putting aside that the more restrictive standard is simply to refrain from engaging in malicious or reckless conduct—if states can punish intentional or reckless conduct respecting nuclear safety by imprisoning or fining the corporate executives responsible (or imposing punitive damages upon them), there will be at least the same impact upon corporate behavior (indeed, quite likely a greater impact) than by "fining" the corporate entities through awards of punitive damages. See *Owen* v. *City of Independence*, 445 U.S. 622, 653-657 & n.37 (1980); *Wood* v. *Strickland*, 420 U.S. 308, 317-321 (1975).

Congress could, presumably, direct the NRC to punish malicious and reckless acts of private nuclear companies even when within regulatory exposure limits, and could, presumably, coincident with enactment of that legislation preempt the states' rights to visit punishment for such conduct. But Congress has not as yet enacted that statute, and there is no evidence that in its absence Congress has preempted the states' power to punish such conduct.[14]

5. Appellees and their *amici* argue that punitive damages should be preempted because such damages might deter potential nuclear operators from entering the industry. This argument is doubly flawed:

a. The argument has no necessary connection to health and safety concerns, and no logical stopping place. The same argument could be made for preemption of state punitive damages for, e.g., engaging in racial discrimi-

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[14] Indeed, as noted in our opening brief, pp. 49-50, n.48, there is a serious question whether Congress *could* preempt state power to punish malicious and reckless acts in the absence of federal assumption of a parallel role or, at the least, a congressional finding of a paramount federal interest that justified creating the vacuum.

nation, willfully overcharging customers, or recklessly violating other mandates of state law that have not been preempted. See *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 633 (1981) ("We do not . . . accept appellants' implicit suggestion that [general statements reflecting a Congressional intent to encourage the production and use of coal] demonstrate a congressional intent to pre-empt all state legislation that may have an adverse impact on the use of coal."); *Pacific Gas & Electric*, *supra* (allowing a state to halt construction of nuclear facilities altogether on economic grounds).

The deterrence argument made by appellees and their *amici* reduces to a contention that Congress' interest in promoting nuclear power must be construed as conferring upon nuclear operators a blanket immunity from the ordinary consequences of doing business that all *other* industries confront. Not only is there no evidence in the legislative history of the various atomic energy statutes that Congress intended to confer such an immunity, but the contrary indication is manifest. Thus, as our opening brief recounted (Aplt Br. 30), Congress received testimony from the AEC that:

> Each claimant has *the same standing to sue and to recover which he has with respect to liability in connection with any other industry.* Similarly, each claimant is subject to the same defenses that can be asserted by any other industry. [Emphasis added.]

Indeed, when Congress did make special provision for the nuclear industry it did so in a way that was carefully limited to certain nuclear operators (not including Kerr-McGee) and only in the event of an "extraordinary nuclear occurrence" (not present here), because, as the AEC had explained (Aplt Br. 35):

> It would appear eminently reasonable to avoid disturbing ordinary tort law remedies with respect to damage claims *where the circumstances are not substantially different from those encountered in many activities of life* which cause damage to persons and property. [Emphasis added.]

With respect to all other industries, including federally regulated industries, Congress has never undertaken to prohibit the award of punitive, but not compensatory, damages in state law tort actions. The decision of the court below, if affirmed, would provide the nuclear industry a unique immunity from the normal operation of state tort law in the face of abundant evidence that Congress did not so intend. (Aplt Br. 30-38).

b. In any event, the proposition that Congress immunized KM (and others like it) from punitive damages in order to encourage entrance into the field is an unlikely supposition respecting congressional intent. Few nuclear operators could have been expected to act maliciously or recklessly in the handling of plutonium, and it is not clear that Congress would have welcomed into the field those who would. It is unlikely, therefore, that Congress would have seen punitive damages as a significant deterrent to entry, let alone one that should be knocked down.[15] On the other hand, given that Congress opted not to immunize or indemnify companies like KM in any way from awards of *compensatory* damages (Aplt Br. 26 & n.32; US Br. 24), and left the states free to impose such damages on any basis they chose—e.g. reasonable care

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[15] When Price-Anderson was first being considered in 1956, the AEC proposed that the indemnity to be afforded by that Act to covered operators not apply in the case of "loss or damage caused by bad faith, willful misconduct or gross negligence." *1956 Hearings* at 44. The AEC explained that the indemnity it had extended to government contractors in the past (see n.7, *supra*) had been inapplicable in such cases. *1956 Hearings* at 77-85. Congress did not doubt what this experience showed: that companies would enter the field without protection for such acts. Rather, Congress rejected the AEC's proposal because the *other* object of Price-Anderson—to assure that in the event of a nuclear catastrophe at a covered facility compensation would be available to the public—would be frustrated by the exclusion: "The suggestion . . . that willful damages be excluded was not accepted *since the damage to the public is the same, whether caused by any means—willful or nonwillful.*" S. Rep. No. 296, 85th Cong., 1st Sess. (1957) at 18 (emphasis added).

or strict liability—regardless of compliance with NRC regulations, such companies faced the far more likely prospect of enormous compensatory liability for even "innocent" conduct that inflicted radiation injuries. Compensatory damages of this nature surely would have been perceived by Congress as a more powerful deterrent to entry than the possibility of punitive damages in the rare instance of "outrageous" conduct. There is thus no basis for attributing to Congress, in the absence of a shred of supportive legislative history and in the face of uniform legislative history that state tort law was not to be displaced, a decision to preempt punitive but not compensatory damages. Cf. *Pacific Gas & Electric*, 51 LW at 4457.

B. KM's State Law Contention

KM contends that the jury's punitive damage award was "incident to the personal injury claim" and has been "nullifie[d]" by the reversal of the award of actual damages for Silkwood's personal injury. KM Br. 41. The court below did not hold the punitive damage award "nullified" on that state law ground, and this Court is hardly the place for the claim to receive its first airing.

The preemption issue remains in this case no matter what disposition might ultimately be made below of KM's "nullification" claim. Under the Oklahoma statute, punitive damages are available even in a case where the only injury is to property.[16] The court below has affirmed the jury's award of actual damages for injury to property (App. 21a). There was a nexus between the reckless conduct shown on this record (which "permit[ted] plutonium to escape into the public domain," App. 85a) and

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[16] See, e.g., *Garland Coal & Mining Co.* v. *Few*, 267 F.2d 785, 790 (10th Cir. 1959); *State ex rel Pollution, etc.* v. *Kerr-McGee Corp.*, 619 P.2d 858, 865 (Ok. 1980); *Taylor* v. *Parker*, 611 P.2d 113 (Ok. 1980); *Davidson* v. *First Bank & Trust Co.*, 609 P.2d 1259 (Ok. 1977); *Z.D. Howard Co.* v. *Cartwright*, 537 P.2d 345, 347-348 (Ok. 1975); *Jones* v. *Lennington*, 629 P.2d 805 (Ok. App. 1981); *Sopkin* v. *Premier Pontiac, Inc.*, 539 P.2d 1393, 1397 (Ok. App. 1975).

the damage to Silkwood's property, and thus under the Oklahoma statute the district court was required to instruct the jury, as it did, that even if the only injury suffered by Silkwood was to property, punitive damages could be awarded (App. 109a-113a).[17]

Therefore, even if the decision below finally resolved appellant's quest for personal injury damages—and it does not [18]—that ruling would not end appellant's entitlement to punitive damages under Oklahoma law. Only preemption could have the latter effect. At most, KM's state law argument goes to the *amount* of the punitive damages appellant may recover.[19] The court below, how-

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[17] KM now suggests (Br. at 44-45)—although it did not argue below—that punitive damages could not have been awarded on the basis of injury to property, because the jury was instructed that compensatory damages for that injury could be awarded on the basis of strict liability. Contrary to KM's implicit assumption, however, Oklahoma law does not bar an award of punitive damages simply because the claim for *compensatory* damages is governed by strict liability; the availability of *punitive* damages turns upon a jury finding of willful or reckless state of mind, which may exist no matter what standard controls compensatory damages. See, e.g., *Garland Coal & Mining Co.* v. *Few*, 267 F.2d 785 (10th Cir. 1959); *Thiry* v. *Armstrong World Industries*, 661 P.2d 515 (Ok. 1983). The jury was properly instructed on the different standard governing punitive damages (App. 112a-113a).

[18] As we have indicated (Aplt Br. 8, n.13), plaintiff is not foreclosed by the decision below from pursuing a claim that Silkwood's personal injuries were the result of *intentional and willful misconduct*, and the Workers' Compensation Act does not bar such a claim, see *Hull* v. *Wolfe*, 393 P.2d 491, 493 (Ok. 1964). KM disputes our right to secure a new trial on personal injuries on that theory. (KM 41-42, n.46). We do not further belabor the point, for that is an issue to be addressed in the first instance by the district court (to whom the matter has been "remanded . . . for further considerations consistent herewith," App. 24a).

[19] The question whether the *existing* punitive damage award may stand despite the Workers' Compensation Act ruling (or whether, instead, there must be a remittitur or new trial on the amount of punitive damages) is not before this Court. Any contention by KM that the amount should be affected by the Workers Compensation Act ruling may have been waived, for KM made no such

ever, by ruling punitive damages altogether preempted, has pretermitted appellant's ability to recover punitive damages in *any* amount.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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argument below. Even if not waived, KM's argument for a reduction is tenuous at best, given the state of Oklahoma law. Under Oklahoma law, a determination that the *compensatory* damages awarded by a jury must be reduced does not necessarily compel any adjustment of the *punitive* damages awarded. See *Garland Coal & Mining Co.* v. *Few*, 267 F.2d 785, 791 (10th Cir. 1959); *Amoco Pipeline Co.* v. *Montgomery*, 487 F. Supp. 1268, 1273 (W.D. Ok. 1980); *Hobbs* v. *Watkins*, 481 P.2d 746, 752, 753-754 (Ok. 1971). This is a reflection of the general principle that an award of punitive damages is aimed not at the injury for which the plaintiff is being compensated, but at "the gravity of the . . . risk of harm to the public" posed by the defendant's malice or recklessness. *Thiry* v. *Armstrong World Industries*, 661 P.2d 515, 518-519 (Ok. 1983). See also *Cates* v. *Darland*, 537 P.2d 336 (Ok. 1975); *State ex rel. Pollution, etc.* v. *Kerr-McGee Corp.*, 619 P.2d 858, 861 (Ok. 1980); *Moyer* v. *Cordell*, 228 P.2d 645, 650 (Ok. 1951); *Jones* v. *Lennington*, 629 P.2d 805, 807 (Ok. App. 1981).